

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 334 of 1979

WITH

CROSS OBJECTIONS

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

NARMADABEN W/O HIRALAL T.

Versus

SATISHCHANDRA TRIKAMLAL

Appearance:

MR PB MAJMUDAR for Petitioner

MR PC MASTER for Respondents

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 10/04/96

ORAL JUDGEMENT

1. The present appeal is filed by the original defendant no.1 wherein respondent nos.1 and 2 are the original plaintiffs and respondent no.3 is original defendant no.2.

2. The plaintiffs had sued for a partition by metes and bounds of the one half share sold by the Court

Receiver and for taking accounts in respect of the income from the suit property.

3. The husband of the first defendant was, at the relevant point of time, the owner of one half share in the suit property and this one half share was sold to the second plaintiff in insolvency proceedings against the husband of the first defendant. This was a court sale through the Receiver of the property (appointed by the court). The sale took place on 17th September 1965. The other half share in the said suit property belongs to the defendants with which we are not concerned in the present appeal.

4. The suit proceeded according to the prescribed procedure and resulted in a preliminary decree being passed by the trial court for partition and accounts as prayed for. It appears that the preliminary decree was not challenged, at least by the present appellant (first defendant), or if challenged, the same was unsuccessful.

5. The Trial Court then proceeded to consider the Commissioner's Report in respect of the accounts tendered by the parties, and as per the preliminary decree, the Commissioner filed his report in the Court. Objections thereto were filed and heard by the Trial Court and ultimately the final decree came to be passed.

6. It appears that the present appellant (first defendant) has challenged the final decree for partition by metes and bounds and the incidental directions given by the court based on the accounting between the parties. A number of grounds have been stated in the memo of appeal. However, what is material is that at the end of such grounds, after ground no.17, the copy of the memo placed before me, as also the original memo of appeal filed in the court, both contain the endorsement which is reproduced below:

" N.B. The appeal is restricted to the amount of Rs.1250/- of Commissioner's cost and regarding Rs.1000/- for construction of latrine.

(sd/] P.B. Majmudar)"

In view of this endorsement, the controversy in the present appeal is extremely narrow. On a plain reading of this endorsement it becomes obvious that the final decree as regards partition by metes and bounds is not the subject matter of the challenge in the appeal.

7. The first point on which a contention was raised is as regards the sum of Rs.1250/- of Commissioner's cost. In this regard learned counsel for the appellant is unable to point out from the judgement or from the final order passed by the Trial Court below the judgement, as to where and how the appellant is directed to pay Rs.1250/- by way of Commissioner's cost.

7.1 Some attempt in this direction is made by referring to para 1 of the final order. However, a plain reading of this direction indicates that the sum in question is not Rs.1250/-, as mentioned in the memo of the appeal, but is in the sum of Rs.1820/-. The second aspect is that this sum of Rs.1820/- is required to be paid by the first plaintiff to the first defendant-appellant. Thus, the appellant is the beneficiary of this amount and obviously therefore the same would not be the subject matter of challenge in the present appeal. The third aspect is that this is not a direction pertaining to the Commissioner's cost, but a direction which flows from the Commissioner's report in respect of the reciprocal accounting rendered by the parties. Thus, the first ground taken in the restricted memo of appeal could not be substantiated by the learned counsel for the appellant.

8. The second ground pertains to the claim of the first defendant, which was negatived by the Trial Court while passing the final decree, that she is entitled to claim Rs.1000/- as costs for construction of a new latrine, since the portion which comes to her share lacks a latrine, which will have to be constructed.

8.1 The Trial Court has dealt with this point extensively in paras 11 and 12 of its final order below Exh.57. I see no reason to interfere with that finding of fact. Suffice it to say that the trial court was entirely justified in concluding that it was the first defendant who has voluntarily opted for and selected that portion of the property which she would choose to retain in the partition which would be effected by metes and bounds. Thus, it was by her choice and her informed consent that she has accepted that portion of the property which was without a latrine. Since it was her own choice, she cannot then be heard to complain that the part of the property coming to her share on partition lacks a latrine and since a new latrine would have to be constructed, she would be entitled to the cost of construction quantified by her at Rs.1000/-. This demand not only contrary to commonsense, but is also unreasonable and not sustainable at law. Under the

circumstances the finding of the Trial Court rejecting this claim is required to be upheld.

9. In view of the restricted grounds of appeal, learned counsel for the appellant has not raised any other contention. This appeal is, therefore, dismissed with no orders as to costs.

10. Cross objections have been filed in the present appeal by the first respondent i.e. original plaintiff no.1.

11. Learned counsel for the respondent-Cross Objector attempted to justify the grounds taken in the memo of cross objections, and in particular, the finding that the first defendant would be entitled to Rs.1820/- from the plaintiff no.1. However, learned counsel for the respondent ultimately had to concede that this amount has been quantified by the Trial court by accepting the report of the Commissioner for taking Accounts, and the Trial Court has accepted this figure only after the concerned parties including the first plaintiff was heard on his objections to the Commissioner's Report. In any case, this is the sum total of various reciprocal and mutual rights and obligations between the parties, and in order to disturb this figure, learned counsel for the Cross Objector would have to substantially challenge the entire report of the Commissioner. Learned Counsel for the Cross Objector, therefore, rightly conceded that on the facts and circumstances of the case and in view of the evidence on record, he would not be able to sustain this position.

12. In the premises aforesaid, there is no substance in the Cross Objections and the same are, therefore, dismissed with no orders as to costs.
